In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 614

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY AND THE BOATMEN'S NATIONAL BANK OF ST. LOUIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this federal estate tax case is whether the trustee's power to invade the corpus of a trust includible in the assets of an estate in behalf of the decedent's widow is so broad that the estate may not have a charitable deduction for the value of the charitable remainder interest in the trust.

The decedent, Frank E. Washburn, created an inter-vivos trust, the income of which was payable to himself for life, to his wife thereafter, and finally to his sister, should she survive either the decedent or his wife. Upon the death of the wife and the sister, the trust was to terminate and the proceeds paid one-sixth each to four private individuals and two charita-

323-764—68

ble institutions. (Pet. A1–A2.) The Commissioner of Internal Revenue denied to the estate of the decedent a charitable deduction under Section 2055(a)(2), Internal Revenue Code of 1954,[1] for the value of the residual charitable interests in the trust because of the power (Pet. A2–A3) given to the trustees to invade trust corpus for the "comfort, welfare, contentment, and happiness" of the decedent's widow, a purpose which was to be made "paramount to the conserving of assets in said Trust."

The deficiency was paid, a refund claim was filed and denied, and this suit for refund followed.[2] The district court entered a summary judgment for petitioners. The court of appeals reversed, holding that the estate was not entitled to the charitable deduction.

---

[1] SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) *In General.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

* * * * * * *

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * * * *

[2] Petitioners are the trustee of the trust and the administrator of the estate (Pet. App. A3 n. 1).

The decision below is correct. There is no conflict of decisions or other basis for further review.

1. This case is controlled by *Merchants National Bank* v. *Commissioner,* 320 U.S. 256. Under regulations approved by this Court in *Merchants Bank, supra,* 320 U.S. at 260, and in *Henslee* v. *Union Planters Bank,* 335 U.S. 595, 597–598 n. 2, if a trust is created for both a charitable and a private purpose, the charitable deduction is available only insofar as the value of the charitable interest at death is "presently ascertainable, and hence severable from the noncharitable interest." Treasury Regulations on Estate Tax (1954 Code), Section 20.2055–2(a).

In *Merchants Bank,* remainders to charity were subject to a disinterested trustee's power to invade principal for the benefit of testator's widow, 67 years old at his death and of substantial independent means, if the trustee, in its "sole discretion", deemed it "wise and proper" to invade principal for the widow's "comfort, support, maintenance, and/or happiness." 320 U.S. at 257–258. The trust instrument in *Merchants Bank* also directed that the trustee "shall exercise its discretion with liberality" to the widow, who was the income beneficiary of the trust for life, "and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries," i.e., the charities. *Id.* at 258. This Court rejected the estate's claim for deductions based upon the value of the charitable remainders, concluding (*Id.* at 263) that the trust provisions authorizing the invasion of corpus contained no "standard fixed in fact and capable of being

stated in definite terms of money", see *Ithaca Trust Co.* v. *United States,* 279 U.S. 151. The Court said (320 U.S. at 262, 263):

> The salient fact is that the purposes for which the widow could and might wish to have the funds spent do not lend themselves to reliable prediction. * * * Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. [Emphasis supplied.]

The trust instrument in the present case contains provisions that are indistinguishable from those which defeated the deduction in *Merchants Bank.* It provides for the invasion of principal by the trustee to satisfy the widow's (Pet. App. A2) "'comfort, welfare, contentment and happiness.'" It states that the trust (*ibid.*) "is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness" of the widow, and that the widow's (*ibid.*) "enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees * * *." Thus the court of appeals properly held (Pet. App. A4–A8) that *Merchants Bank,* supra, controls.

Petitioners cannot avoid the principle of *Merchants Bank* by reliance on *Ithaca Trust Co.* v. *United States, supra* (see Pet. 8–17), which holds only that a power

of invasion in behalf of a private beneficiary the benefits of which cannot exceed the standard of living to which the private beneficiary had been accustomed during the decedent's life is sufficiently fixed to permit valuation of a charitable remainder exclusive of the potential private use of trust principal. Although the present trust does contain a standard of living clause, that limitation on invasion is expressed only in the conjunctive with the broader language found in the *Merchants Bank* trust. The court of appeals recognized that the trust instrument (Pet. App. A6) "contains language similar to the invasion-of-principal clauses in both *Ithaca* and *Merchants Bank*" and concluded that (*Id.* A9) "where an instrument contains both a broad and a narrow standard of invasion, the broad standard should be given effect." That conclusion adopted the reasoning of other courts of appeals in similar cases (see *Union Trust Co.* v. *Tomlinson,* 355 F. 2d 40 (C.A. 5); *State Street Bank and Trust Co.* v. *United States,* 313 F. 2d 29 (C.A. 1)) and, as the court below observed (Pet. App. A9), "to do otherwise would require the court to ignore the broader language."

2. The Kansas authorities on which petitioners rely (Pet. 17–33) do not bring the trust language at issue here within the rule of *Ithaca Trust.* The court of appeals rejected this interpretation of Kansas law after careful analysis of petitioner's contention (Pet. App. A9–A13),[3] and there is nothing in this case to

[3] The court of appeals specifically rejected petitioners' reliance on *In re Estate of Woods*, 181 Kan. 271, 311 P. 2d. 359, the state case principally relied on by petitioners here (Pet. 25–30;

take it beyond the rule that this Court does not ordinarily review a lower court's interpretation of local law. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667; *Sims* v. *United States*, 359 U.S. 108.

Furthermore, the court below properly distinguished its earlier decision in *United States* v. *Powell*, 307 F. 2d 821 (C.A. 10) (Pet. App. A10–A13) on the ground that in the instrument there the power of invasion for the "welfare", "comfort", and "happiness" of private beneficiaries was limited to a standard-of-living measure because of the context in which that language appeared, particularly an additional provision directing the trustee to exercise the power "with restraint and only when the purpose justified a reduction of the corpus * * *." 307 F. 2d at 828. Since *Powell* and the present case represent constructions of trust instruments according to their separate and appreciably different terms, there is no occasion for certiorari in the different results reached in the two cases.

Pet. App. A9–A10.) That decision merely held that a beneficiary, whose right to trust income depended upon a showing that her funds had become depleted within the meaning of the trust instrument, was entitled to that income upon a showing that her personal resources failed to provide her a standard of living comparable to that to which she had been accustomed. 311 P. 2d at 366–367. Thus the Kansas court decided only that the testator's expression of intent to provide for the "comfort and happiness" of his daughter meant *at least* that the daughter was to benefit from the trust when her other resources did not provide her with her customary standard of living. It did not consider whether the use of the word "happiness" provided for support beyond her accustomed standard of living.

3. Contrary to petitioners' contention here (Pet. 33–35), the court below properly denied their motion to dismiss the Government's appeal as untimely. Their position is predicated on the fact that the Government's notice of appeal was filed within sixty days after the district court's entry of judgment rather than within sixty days after the filing of the district court's opinion which announced the granting of petitioner's motion for summary judgment.

The judgment directing the United States to pay a stated sum to the taxpayers was not signed by the district judge or filed until June 1, 1967.[4] Petitioners' effort to transmute the district court's opinion into a judgment, entry of which begins the running of the time for appeal, ignores the requirement of Rule 58, Federal Rules of Civil Procedure, that "every judgment shall be set forth on a separate document." The district court in the present case did precisely what the rule requires when it entered judgment on June 1, 1967, and the notice of appeal filed on July 28, 1967, was therefore timely. Rule 73(a), Federal Rules of Civil Procedure (abrogated as of July 1, 1968); see, also, Rule 4(a), Federal Rules of Appellate Procedure.[5]

---

[4] We have printed that judgment as an appendix to this response. The opinion granting the motion for summary judgment is printed as Appendix D to the petition, pp. A27–A35.

[5] Although immaterial, petitioners incorrectly state (Pet. 35) that the amount due them was known by both parties upon entry of the district court's opinion. Correspondence between the parties, extending over several months between December 23, 1966, and the entry of judgment on June 1, 1967, evidenced an area of disagreement regarding the amount. See attachments to the Government's memorandum in opposition to appellees' motion to dismiss appeal, which was filed in the court below and is part of the record here.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

MELVA M. GRANEY,
LOUIS M. KAUDER,
Attorneys.

NOVEMBER, 1968.